

STATE OF MONTANA

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DECISION AND ORDER

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His final contract with the District (Joint Exhibit 10J, County Superintendent File) was for the period between July 1, 1995 and June 30, 1997. On January 29, 1997, the Board voted not to offer Mr. Small a new contract for school year 1998-99. The District did not provide Mr. Small with the procedural rights stated in § 20-4-204, MCA, for a tenured teacher. He appealed the Board's action to the County Superintendent.

On May 21, 1997, Mr. Small and the District filed stipulated facts and jointly moved for a summary ruling on the following question:

"Whether the termination of Small's employment by the Board of Trustees was undertaken in violation of Section 20-4-204, MCA."

The County Superintendent ruled in favor of the District holding that:

- "1. Petitioner was not entitled to tenure and therefore was not a tenured teacher under Section 20-4-203 MCA.
2. Respondent was not required to terminate Petitioner in accordance with the provisions of Section 20-4-204 MCA or 20-4-207 MCA."

County Superintendent Order, page 8.

Mr. Small appealed to this Superintendent. Having reviewed the Stipulated Facts, the County Superintendent's Conclusions of Law and Order, the record and the parties' briefs, the State Superintendent of Public Instruction now enters the following:

ORDER

The County Superintendent's ultimate conclusion is correct as a matter of law. He correctly applied case law and statute to the stipulated facts in this case and determined that because Mr. Small's position with the district was that of an assistant superintendent, not a teacher, he was not entitled to the procedural protections of § 20-4-204, MCA. The order is **AFFIRMED**.

STANDARD OF REVIEW

The State Superintendent's review of a county superintendent's decision is based on the standard of review of administrative decisions established by the Montana Legislature in § 2-4-704, MCA, and adopted by this Superintendent in ARM 10.6.125. The facts in this case are stipulated to by the parties and not subject to review. Conclusions of law are reviewed to determine if the correct standard of law was applied. See, for example, Harris v. Trustees, Cascade County School Districts No. 6 and F, and Nancy Keenan, 241 Mont. 274, 786 P.2d 1164 (1990) and Steer, Inc. v. Dept. of Revenue, 245 Mont. 470, 803 P.2d 601 (1990).

MEMORANDUM OPINION

The controversy in this case is a question of fact. As discussed below, statute and case law in Montana establish the parameters of tenure. An individual who holds a teaching position -- teacher, principal, administrator -- can acquire tenure. A person holding a superintendent position cannot acquire tenure. A person holding a dual position -- superintendent/principal for example -- can acquire tenure as a principal. To answer the question stipulated by the parties the County Superintendent had to determine what position in the District Mr. Small held. Was he, in fact, an assistant superintendent who did not have tenure, or was he a principal and/or administrator who did have tenure?

The statutes and case law on tenure are clear. Section 20-1-101(18) defines "teacher" as

. . . a person, except a district superintendent, who holds a valid Montana teacher certificate that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who is employed by a district as a member of its instructional, supervisory, or administrative staff. This definition of a teacher includes a person for whom an emergency authorization of employment has been issued under the provisions of 20-4-111.

Section 20-1-101(9) defines "principal" as:

. . . a person who holds a valid class 3 Montana teacher certificate with an applicable principal's endorsement that has been issued by the superintendent of public instruction under the provisions of this title and the policies adopted by the board of public education and who has been employed by a district as a principal. For the purposes of this title, any reference to a teacher must be construed as including a principal.

Section 20-4-203 confers tenure "whenever a teacher has been elected by the offer and acceptance of a contract for the fourth consecutive year of employment by a district in a position requiring teacher certification except as a district superintendent or specialist . . ."

The position of principal is, by definition in § 20-1-101(9), a teaching position, and a principal can acquire tenure and/or will continue to have tenure rights. It is also clear for Irene D. Sorlie v. School District 2, 205 Mont. 22, 667 P.2d 400, 40 St. Rep. 1070 (1983), that an individual with a teaching certificate who acquires tenure as a teacher then accepts an administrative position continues to have tenure. "We conclude that tenure acquired as a teacher applies to a subsequent administrative position. Section 20-1-101(20) MCA, [now 20-1-101(18)] clearly provides that a teacher and administrator are comparable positions for the purpose of acquiring tenure. If this were not so, an educator could lose tenure rights by accepting a promotion to an administrative position." Sorlie, 40 St. Rep. at 1073.

An individual in a dual tenured and non-tenured position -- superintendent/principal for example -- is not tenured in the superintendent position but can acquire tenure in the principal position:

While Hurtt[a superintendent/principal], in his capacity as a superintendent cannot complain that his employment was unlawfully terminated, he also served as a principal and termination of his employment in that capacity must follow statutory procedures outlined for principals.

Hurt v. School District 29, 222 Mont. 415, 723 P.2d 205, 43 St. Rep. 1377, 1381 (1986).

The issue to be decided in this case is whether the facts establish Mr. Small's position was that of an assistant superintendent, and therefore not tenured, or an administrator and/or principal with four consecutive contracts, and therefore tenured. The facts establish Mr. Small's position was as assistant superintendent and it follows that he did not have tenure.

There are legal and policy reasons why teacher positions carry tenure and superintendent positions do not but that analysis does not resolve this controversy. The relevant analysis is whether the duties and functions of Mr. Small's position were more like those of a superintendent or those of a principal or teacher.

The words "administrator" "principal" and "assistant superintendent" are not shibboleths, and classifying positions into tenured or non-tenured does not simply hinge on whether the position is labeled "administrator" or "principal" in contrast to "assistant superintendent." For example, if a school district employed a human resource director (or a business manager, plant manager, transportation director, lawyer, etc.) for four consecutive years and referred to that person as an "administrator" it would not follow that the individual held a tenured position. What matters is the function of the position -- if the duties of the position assist the superintendent in his or her duties as agent for the board of trustees it is a non-tenured position. If the duties of the position assist the superintendent to support teachers in their education functions in the district it is a tenured position.

The label on a position is not dispositive. What is dispositive is the function. In Sorlie the Court analyzed whether the employee had tenure rights based on the duties of the

administrative position. Ms. Sorlie was "Coordinator of Intermediate Education" in the Billings School District. The Court wrote:

Sorlie was employed by the School District in 1951. She taught until 1978 when she accepted an administrator's contract to be Coordinator of Intermediate Education. Her administrative duties included curriculum development and working with teachers of grades 4 through 6 experiencing teaching difficulties. The record indicates that Sorlie had an exemplary record as a teacher and consequently earned the position as Coordinator of Intermediate Education. She was able to use her many years of service to assist other teachers having certain teaching difficulties and established an excellent record as an administrator.

Sorlie, 40 St. Rep. at 1071.

The Court analyzed the question of whether the position was tenured based on the facts in the record. To have tenure a person must hold a position that has a teaching function. That is also the analysis to be applied in this case. Do the facts of Mr. Small's employment establish his position was that of principal/administrator or that of a superintendent.

In this case, the parties stipulated to the following facts as dispositive:

1. Small was initially hired by the School District in May of 1987 as Assistant Superintendent for a period of eight (8) days. A copy of Small's initial employment contract is attached hereto as Joint Exhibit "1A".

2. Small was subsequently rehired as Assistant Superintendent for the 1987-1988 school year under written contract, a copy of which is attached hereto as Joint Exhibit "2B".

3. Small was subsequently rehired as Assistant Superintendent for the 1988-1989 school year under written contract, a copy of which is attached hereto as Joint Exhibit "3C". In addition to his duties as Assistant Superintendent, Small was also assigned duties as Rural School Principal during the 1988-1989 school year.

4. Small was subsequently rehired as Assistant Superintendent for the 1989-1990 and 1990-1991 school years under written contract, a copy of which is attached hereto as Joint Exhibit "4D". Small was not assigned any duties as Principal during this time period.

5. Small was subsequently rehired as Assistant Superintendent for the 1990-1991 and 1991-1992 school years under written contract, a copy of which is attached as Joint Exhibit "5E". Small was not assigned any duties as Principal during this time period.

6. Small was subsequently rehired as Assistant Superintendent for the 1991-1992 and 1992-1993 school year under written contract, a copy of which is attached hereto as Joint Exhibit "6F". Small was not assigned any duties as Principal during this time period.

7. Small was subsequently rehired as Assistant Superintendent for the 1993-1994 school year under written contract, a copy of which is attached hereto as Joint Exhibit "7G". In addition to his duties as Assistant Superintendent, Small was also assigned duties as Principal of K. W. Bergan school for the 1993-1994 school year.

8. Small was subsequently rehired as Assistant Superintendent for the 1994-1995 school year under written contract, a copy of which is attached hereto as Joint Exhibit "8H". Small was not assigned any duties as Principal during this time period.

9. The parties entered into a written agreement to terminate the severance pay provision contained in paragraph 5 of Joint Exhibit "8H" and to eliminate that provision from Small's contract for the 1995-1996 and 1996-1997 school year. A copy of that agreement is attached hereto as Joint Exhibit "9I".

10. Small was subsequently rehired as Assistant Superintendent for the 1995-1996 and 1996-1997 school years under written contract, a copy of which is attached hereto as Joint Exhibit "10J". In addition to his duties as Assistant Superintendent, Small was also assigned duties as Rural Schools Principal for the 1995-1996 and 1996-1997 school years.

11. During his employment as Assistant Superintendent, Small has been required to maintain a valid Class 3 certificate with Superintendent endorsement in accordance with the position description of the Assistant Superintendent, a copy of which is attached hereto as Joint Exhibit "11K".

12. During his employment as Assistant Superintendent, Small has maintained a valid Class 3 certificate with Superintendent endorsement and Elementary Principal endorsement. During that time period, Small has also maintained a valid Class 1 elementary certificate with elementary curriculum endorsement, copies of which are attached hereto as joint Exhibit "12L".

13. On January 29, 1997, the Board of Trustees voted to terminate Small's employment with the School District at the conclusion of his present contract.

14. On or about February 11, 1997, Small requested that the Board provide him with reasons for their decision to terminate his employment.

15. On or about February 26, 1997, the Chairman of the Board of Trustees provided Small with a letter outlining the reasons for the Board's decision to terminate him.

16. During his employment with the District, Small has never entered into any agreement, written or otherwise, either expressly addressing the existence of or expressly waiving any tenure rights he might have.

County Superintendent Decision and Order, pages 2-5.

Based on these facts the County Superintendent determined that the functions of Mr. Small's position were more like those of a superintendent than a teacher and that finding is not arbitrary and capricious. The stipulated facts and the wording of the contracts established that Mr. Small's duties in the District were those of a superintendent, not those of a teacher or principal. Statutorily, superintendents do not have tenure and as a general maxim of law for interpreting Montana statutes "the greater contains the less" (§ 1-3-227, MCA), therefore, an assistant superintendent does not have tenure. It follows that Mr. Small was not tenured in his position as an assistant superintendent. The order is affirmed.

DATED this _____ day of May, 1999.

NANCY KEENAN

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on this _____ day of May, 1999, a true and exact copy of the foregoing DECISION AND ORDER was mailed, postage prepaid, to the following:

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